RECORD
AND
BRIEFS

No. 15-7250

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPREME COURT, U.S.
FILED
DEC 02 2015
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, MARCELO MANRIQUE, pursuant to Sup. Ct. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed in forma pauperis.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon Rule 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
December 2, 2015

By: _____

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IN THE
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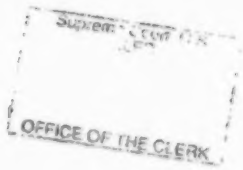
MARCELO MANRIQUE,

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v.

UNITED STATES OF AMERICA,

Respondent.



On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates this Court's decision in Lemke v. United States, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits that a premature notice of appeal matures or springs forward when the judgment under review is entered. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court's decision in Dolan v. United States, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time Dolan was decided, the Court acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences", but it "le[ft] all such matters for another day." 560 U.S. at 618. The Manrique decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award.

This case mirrors a typical deferred restitution appeal. At Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that "restitution is mandatory." The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered,

identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. Although the government posited no objection, the Court of Appeals ruled, sua sponte, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount.

The Eleventh Circuit's decision below in United States v. Manrique, 618 F. App'x 579 (11th Cir. 2015), conflicts with the Court's decision in Lemke, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice.

Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in Dolan v. United States, 560 U.S. 605, 618 (2010)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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On Petition for Writ of Certiorari to the
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for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Marcelo Manrique respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 14-13029 in that court on July 15, 2015, United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015), reh'g en banc denied on September 11, 2015, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix at A. A copy of the Order denying rehearing en banc is appended at B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals, denying a timely-filed petition for rehearing and rehearing en banc, was entered on September 11, 2015. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that Courts of Appeals shall have appellate jurisdiction of all final decisions of United States district courts.

STATUTORY AND RULES PROVISIONS INVOLVED

Rule 4, Federal Rules of Appellate Procedure
Appeal as of Right–When Taken

***

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

***

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

Rule 52, Federal Rules of Criminal Procedure
Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Title 18 U.S.C. § 2252(a)(4)(B)
§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

***

(4) . . . (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

***

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . .

Title 18 U.S.C. § 3663A

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

***

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Title 18 U.S.C. § 3664

§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT OF THE CASE

A. District Court Proceedings.

Marcelo Manrique pleaded guilty to violation of 18 U.S.C. § 2252(a)(4)(B), possession of material involving sexual exploitation of minors. On June 23, 2014, the district court sentenced Mr. Manrique to 72 months imprisonment, lifetime supervised release, and announced "restitution is mandatory." DE 61:38.

A Judgment in a Criminal Case was filed the next day, June 24, 2014. It recites the terms of imprisonment and supervised release, and states that, "The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." App. C; DE 53:5. A notice of appeal was filed on July 8, 2014, directed to the final judgment and sentence. DE 55. The appeal was docketed by the Court of Appeals under Case No. 14-13029. App. F.

The district court entered a second Judgment in a Criminal Case, dated September 18, 2014, following a hearing on restitution. The second judgment is the same as the first in all respects except it specifies the dollar amount of restitution – $4,500 – and the manner in which it should be paid. App. D.; DE 67:5. Four days later, on September 23, 2014, the district court clerk transmitted the amended judgment to the Court of Appeals, which filed it on the docket of the appeal already pending in that court. App. F.

B. Court of Appeals Proceedings.

Mr. Manrique's appeal of the judgment was initiated by the filing of a notice of appeal on July 8, 2014, DE 55, following entry of the first judgment. The second judgment including restitution was filed on the docket of the pending appeal on September 23, 2014. See COA Docket Sheet, Case No. 14-13029 (Sept. 23, 2014) ("USDC Restitution Order as to Appellant Marcelo Manrique was filed on 9/18/2014. Docket Entry 67"). All transcripts of proceedings, including the restitution proceeding, were prepared and filed in the Court of Appeals before the Court of Appeals' Clerk issued a first briefing notice, about two months after the second judgment had been entered. App. F.

The parties thereafter briefed the issues on appeal, including a challenge to the restitution portion of the sentence, between December 2014 and February 2015, months after both judgments had been entered and filed in the Court of Appeals under the single case number. At no time did the government challenge the Court of Appeals' jurisdiction over the restitution portion of the sentence, nor did the government allege it suffered any prejudice from a single notice of appeal.

The Court of Appeals addressed and affirmed appellate challenges to the sentence of imprisonment and lifetime term of supervised release, but determined – sua sponte – that it lacked jurisdiction to decide the restitution issue because the appellant did not file a second notice of appeal in the same pending appeal once the second judgment was entered. There was neither briefing nor oral argument on the

jurisdictional issue raised for the first time in the Court of Appeals' opinion. App. A (July 15, 2015).

Mr. Manrique filed a petition for rehearing and rehearing en banc, which challenged the Court of Appeals' sua sponte decision that it lacked jurisdiction over the restitution question. The Court of Appeals denied rehearing and rehearing en banc on September 11, 2015. App. B. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

Mr. Manrique's petition involves the fairly common practice of deferred restitution judgments, as permitted by the Court's decision in Dolan v. United States, 560 U.S. 605 (2010); the interaction of such judgments with rules of appellate procedure; and the jurisdictional prerequisites to appeal deferred restitution awards. The possibility of these logistical concerns was perceived by the Court in Dolan, but left to be addressed later. The time for resolution has arrived, as this case and a significant circuit split illustrate.

The district judge in Manrique's case pronounced sentence, including terms of imprisonment and lifetime supervised release, and also announced that "restitution is mandatory." DE 61:38. A Judgment in a Criminal Case was filed the next day, reciting the terms of imprisonment and supervised release, but deferring entry of the restitution portion of the sentence. DE 53:5. The judgment states, "The determination of restitution is deferred until 9/22/14. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." Id. A notice of appeal as to the final judgment and sentence was timely filed on July 8, 2014. DE 55. These events are typical in a deferred restitution case.[1]

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[1] See e.g., United States v. Cheal, 389 F.3d 35, 46-47 (1st Cir. 2004) (announcing at sentencing that "[y]ou shall pay restitution," including that fact in final judgment, but deferring restitution hearing, then entering deferred amended judgment including restitution amount); United States v. Hyde, 556 F. App'x 62 n.1 (2d Cir. 2014) (entering deferred restitution judgment); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (same); United States v. Castro, 554 F. App'x 664 (9th Cir. 2014) (same).

After the dollar amount of restitution was decided, the district court entered a second Judgment in a Criminal Case, dated September 18, 2014. The second judgment was the same as the first in all respects except it specified the dollar amount of restitution and the manner in which it should be paid. DE 67:5. Four days later the second judgment was transmitted to the Court of Appeals, which filed it on the docket of the pending appeal initiated by the notice of appeal. In the ensuing months, all transcripts and appellate briefs were filed, including full briefing on the merits of Mr. Manrique's restitution challenge. The government posited no objection to hearing the restitution challenge, nor did it argue any prejudice resulting from hearing the restitution issue in conjunction with the appeal of the term of imprisonment and supervised release.

The Court of Appeals refused to decide Mr. Manrique's appeal of the restitution aspect of his criminal sentence, deciding sua sponte that it lacked jurisdiction to do so.

> We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount.

618 F. App'x at 583.

The legal determination that the Court of Appeals lacked jurisdiction is in conflict with decisions of this Court, Fed. R. App. P. 4(b)(2), and most Courts of Appeals. As a result of the decision below in Manrique, there now exists a significant split among the circuits on the jurisdiction of a Court of Appeals to hear an appeal of a deferred restitution judgment entered during the pendency of a criminal appeal.

Eight circuits – the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth – hold, in accordance with Rule 4(b)(2) that a premature notice of appeal in a criminal case matures upon entry of the written judgment. Two circuits hold otherwise, although with different rationales. The Eleventh Circuit holds it lacks jurisdiction unless a second notice of appeal is filed within the same pending appeal. The Ninth Circuit has held that, although it has jurisdiction in an appeal with a prematurely filed notice, it may dismiss the appeal of that issue if the government simply objects. Exacerbating this split, the First Circuit – which recognizes it has jurisdiction to hear such an appeal without a second notice of appeal (joining with eight other circuits) – notes that the timeliness of the notice may be uncertain, so it has prospectively ordered that future restitution awards should be followed by a second notice of appeal.

In the specific context of premature notices of appeal of deferred restitution judgments, the circuits are similarly split, 4-1 in favor of jurisdiction, but due to one circuit's ambivalence, the split may be 3-2, as explained more fully in subsection B, infra. One thing is clear: The jurisdictional and procedural prerequisites relating to the appeal of a restitution award are hopelessly unclear, varying from circuit to circuit.

A. Premature notices of appeal in criminal cases mature pursuant to Fed. R. App. P. 4(b)(2).

Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates the Court's decision in Lemke v. United States, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits

that a premature notice of appeal matures or springs forward when the judgment under review is entered.

In Lemke v. United States, the Court considered the jurisdictional significance of Fed. R. Crim. P. 37, the predecessor to Fed. R. App. P. 4(b)(2). Lemke filed his notice of appeal after sentencing, but three days before the judgment in a criminal case was entered. No notice of appeal was filed after that time. In a divided decision, the Court of Appeals dismissed the appeal due to the premature notice of appeal. One judge dissented, concluding that "the notice of appeal, though premature, was not a nullity. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a)." Lemke v. United States, 203 F.2d 406, 407 (9th Cir. 1953) (Pope, J., dissenting), cert. granted and remanded, 346 U.S. 325 (1953). This Court granted certiorari and remanded, noting that the notice of appeal was still on file when the judgment was entered, and holding – consistent with Judge Pope's dissent – that the "irregularity is governed by Rule 52(a) which reads 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 346 U.S. 325.

"The holding of Lemke was incorporated into Rule 37's successor, Fed. R. App. P. 4(b)." United States v. Malcom, 114 F.3d 1190 (6th Cir. 1997) (unpublished) (holding premature notice of appeal in criminal case is valid and matures to cover later-filed judgment, absent prejudice to the government) (citing 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, et al. Federal Practice & Procedure Jurisdiction § 3950.11 (4th ed. Apr. 2015)). Wright & Miller recounts the direct connection between Rule 37 and Rule 4(b)(2):

> The predecessor to Rule 4(b)(2) entered the Criminal Rules in the 1966 amendments to Criminal Rule 37(a)(2). When the Appellate Rules took effect in 1968, Rule 37(a)(2)'s premature-notice provision was incorporated into Rule 4(b) without any change in substance. The provision was re-worded in 1993. As part of the 1998 restyling of the Appellate Rules, the provision was placed in subdivision (b)(2). As of 2008, Rule 4(b)(2) provides that "[a] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

Id. at § 3950.11 (footnote omitted).

Rule 4(b)(2) ripening is applicable to deferred restitution judgments in criminal cases, as explained by the Second Circuit's decision in Hyde v. United States, 556 F. App'x at 62 n.1:

> Hyde filed his notice of appeal on November 9, 2012, after the district court entered its original judgment on November 2, 2012. The district court did not determine the amount of restitution until it entered an amended judgment on February 22, 2013. Hyde did not, however, file a new notice of appeal from the amended judgment. The government does not contest the timeliness of Hyde's appeal. While Hyde's notice of appeal was likely effective with respect to the original judgment, we conclude that it "ripened into an effective notice" of appeal from the amended judgment as well. United States v. Kapelushnik, 306 F.3d 1090, 1093–94 (11th Cir. 2002); see also Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 663 n. 6 (2d Cir. 2012)("Although [appellant] filed a premature notice of appeal, because the district court entered an amended final judgment before the appeal was heard and [appellee] suffered no prejudice, the jurisdictional defect has been cured.").

Hyde at 63 n.1.[2]

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[2] It is important to distinguish between the ripening clause of Fed. R. App. P. 4(b)(2), which relates to criminal appeals, and the similar provision in Rule 4(b)(1), relating solely to civil appeals. The 1993 amendment to Rule 4 effected a substantial change for civil cases, although it simply reiterated the law applying to criminal appeals. Prior to the 1993 rules amendment, Rule 4(b)(1) (civil appeals) provided that "[a] notice of appeal filed before the disposition of any of the [designated post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). This Court had interpreted

Hyde relied in part on the Eleventh Circuit's Kapelushnik decision, abrogated below by Manrique, which causes an inherent circuit split. As explained in the next subsection, the Manrique decision forges a significant split in authority with other circuits, as well.

B. Manrique's holding exacerbates a significant circuit split.

Consistent with Lemke, and Rule 4(b)(2), eight circuits have expressly acknowledged the vitality of a premature notice of appeal in a criminal case. United States v. Cheal, 389 F.3d 35 (1st Cir. 2004) (holding premature notice of appeal filed after sentencing, but before restitution was ordered, was sufficient, where both parties fully briefed the restitution issue and there was no question of government surprise or prejudice); Hyde v. United States, 556 F. App'x 62, 63 n.1 (2d Cir. 2014) (holding that original notice of appeal of criminal judgment ripened into an effective notice from the amended judgment designating restitution); United States v. Andrews, 681 F.3d 509,

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that provision in a civil case as making such a notice of appeal a "nullity, . . . as if no notice of appeal were filed at all." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982). The 1993 amendment replaced the "nullity" rule in civil appeals with a rule that recognizes ripening of a premature notice of appeal. See Fed. R. App. P. 4(b)(2) advisory committee's note (1993). The committee's note explains the provision was written to eliminate the "trap" that previously resulted in a civil appeal if an unsuspecting litigant did not file a second notice of appeal if an amended judgment was entered while the appeal was pending under the original notice of appeal.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. The 1993 amendment to Rule 4(b)(2) (criminal appeals) simply codified prior precedents of this Court and the circuits, which had recognized that a premature notice of appeal in a criminal case does not deprive a court of appeals of jurisdiction to hear an appeal of the judgment and sentence.

516 n.2 (3rd Cir. 2012) (holding premature notice of appeal deemed filed as of date final judgment was later entered); United States v. Thornton, 1 F.3d 149, 157-58 (3rd Cir. 1991) (holding Court of Appeals had jurisdiction over appeals of post-trial motions, despite premature notice of appeal, because parties had fully briefed the issues without any claim of prejudice); United States v. Bly, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (holding Court of Appeals had jurisdiction, despite premature notice of appeal, based on Rule 4(b)(2) because it "is deemed to be 'filed on the date of and after entry'"); United States v. Winn, 948 F.2d 145, 155 (5th Cir. 1991) (holding that, absent prejudice, Court of Appeals would hear challenges to both judgment and sentence despite premature notice of appeal); United States v. Baker, 559 F.3d 443, 447 n.2 (6th Cir. 2009) (holding Court of Appeals had jurisdiction over premature notice of appeal filed after sentencing, but before judgment entered); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (holding notice of appeal timely filed as to final judgment "spring[s] forward" to confer jurisdiction on deferred judgment regarding restitution) (relying on United States v. Malcolm, 114 F.3d 1190 at *6 (6th Cir. 1997) (unpublished) and the Eleventh Circuit's since-abrogated decision in Kapelushnik, 306 F.3d at 1093-94); United States v. Cantero, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (holding that Rule 4(b)(2) permits notice of appeal to be filed after sentencing, but before entry of final judgment); United States v. Walker, 915 F.2d 1463, 1465 (10th

Cir. 1990) (holding premature notice of appeal filed before sentencing ripens when judgment is formally finalized, conferring jurisdiction on Court of Appeals).[3]

As noted above, Hyde relied in part on the Eleventh Circuit's decision in Kapelushnik, the decision the Eleventh Circuit abrogated in its Manrique decision below. Until the Manrique decision abrogated its prior precedent, the Eleventh Circuit also held that a premature notice of appeal matures upon the filing of the final judgment. See United States v. Kapelushnik, 306 F.3d at 1090 (holding that "once the judgments of conviction [including restitution] became final, the Government's premature notice of appeal ripened into an effective notice as of that date.") (citing United States v. Curry, 760 F.2d 1079, 1079-80 (11th Cir. 1985) (holding that, where defendant filed notice of appeal after verdict but before sentencing, "premature notice of appeal is effective to perfect appeal as of the date the sentence is entered as the judgment."); United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013) (holding that, where district court's restitution order was not final when timely notice of appeal was filed, it "ripened into an effective notice of appeal on the date the district

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[3] Another distinction between the civil and criminal subsections of Rule 4 supports this conclusion. "While the appellate rules specifically require an appellant in a civil case to file an amended notice if he wishes to bring certain post-judgment motions within the scope of his appeal, see Fed. R. App. P. 4(a)(4), there is no parallel provision for criminal cases." Malcolm, 114 F.3d at *7. As Malcolm explained, several circuits have reasoned that this distinction implies that an appellant in a criminal case is under no duty to amend his notice of appeal, so long as the government is not prejudiced thereby. Id., citing United States v. Thornton, 1 F.3d at 157-58 (3d Cir.); United States v. Winn, 948 F.2d at 155 (5th Cir.); United States v. Walker, 915 F.2d at 1465 (10th Cir.); see also,16 A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3950.11 at 253-54 (2d ed. 1996).

court made its final restitution determination") (citing Kapelushnik). Manrique incorrectly overruled that precedent.

The Eleventh Circuit professed that the change in its precedent was driven by this Court's decision in Dolan v. United States:

> We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. See United States v. Kapelushnik, 306 F.3d 1090, 1093-94 (11th Cir. 2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90-day deadline . . . does not deprive the court of the power to order restitution." Dolan v. United States, 560 U.S. 605, 611 (2010). We subsequently recognized, in light of Dolan, the Kapelushnik framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. United States v. Muzio, 757 F.3d 1243, 1246 (11th Cir.), cert. denied 135 S. Ct. 395 (2014).

Manrique, 618 F. App'x at 582-83. Although this explains the need for the Court of Appeals to recognize its jurisdiction over the initial judgment, it does not explain or justify ignoring Rule 4(b)(2) ripening as to the deferred restitution judgment.

By expressly abrogating Kapelushnik, in its decision below, the Eleventh Circuit has created a serious split with the Court's decision in Lemke, Rule 4(b)(2), and the uniform holdings of eight other circuits. The only other circuit that has failed to give effect to Rule 4(b)(2) ripening is the Ninth Circuit, in United States v. Castro, 554 F. App'x 664 (9th Cir. 2014), which held that a timely notice of appeal from a final judgment, filed before the restitution award, should be dismissed where the government objects to untimeliness in its answer brief. Although Castro acknowledges that the timeliness requirement is not jurisdictional – so in that sense it differs from

the Eleventh Circuit's decision below – it refused to give effect to the ripening clause of Rule 4(b). Adding another dimension to the circuit split is the First Circuit's decision in United States v. Cheal. Although Cheal acknowledges no jurisdictional barrier to a single notice of appeal, the First Circuit is uncertain about timeliness, so it recommends a best practice to be applied prospectively: "[L]ooking to the future, we think that, as a general proposition, a deferred restitution order entered pursuant to § 3664(d)(5), subsequent to a final judgement of conviction which has been directly appealed, should be the subject of a second notice of appeal." 389 F.3d at 51, 52.

Focusing specifically on the interaction of Rule 4(b)(2) and deferred restitution judgments, as here, the circuit split is equally problematic. In this more focused context, the circuits split 4-1 on the jurisdiction of a Court of Appeals to decide a restitution challenge based solely on the filing of a premature notice of appeal. Four circuits recognize their jurisdiction – the First (Cheal), Second (Hyde), Sixth (Stoian), and Ninth (Castro) – while the Eleventh (Manrique) holds that it lacks jurisdiction. But even that circuit split can arguably be counted differently, as 3-2, because although the Ninth Circuit recognized its jurisdiction in Castro it still refused to give effect to Rule 4(b)(2) ripening. And, although Cheal stands with the majority of circuits on jurisdiction and ripening, the First Circuit is uncertain enough to advise a practice contrary to what Rule 4(b)(2) expressly authorizes.

Thus, the circuit division is manifest: Most circuits recognize and give effect to the ripening clause, while two do not, and one of the circuits recognizing ripening

recommends a practice at odds with Rule 4(b)(2) because it is uncertain about the interaction of appellate rules in the aftermath of Dolan.

To be sure, the Eleventh Circuit's Manrique decision is the outlier, at odds even with its own prior precedent. In United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013), for example (now abrogated along with Kapelushnik), the Eleventh Circuit had relied on Kapelushnik and Rule 4(b)(2) to hold that a premature notice of appeal ripened to cover a deferred restitution judgment. 503 F. App'x at 508. Following its decision in Manrique, however, the Eleventh Circuit's position is expressly in conflict with the Court's decision in Lemke, Rule 4(b)(2), and the majority of other circuits.

C. Manrique's jurisdictional determination is wrong.

The holding below is ostensibly premised on the Eleventh Circuit's recent decision in United States v. Muzio, 757 F.2d 1243 (11th Cir.), cert. denied 135 S. Ct. 395 (2014), which altered circuit precedent following this Court's decision in Dolan v. United States, 560 U.S. 605, 611 (2010). Yet, the Court's decision in Dolan neither requires, nor counsels in favor of, abandoning the existing premature notice rule. Neither does the Eleventh Circuit's corrective opinion in Muzio. The decision below misapprehends Dolan and Muzio and has effectively muddled jurisdiction in criminal cases with briefly-deferred restitution hearings.

In Dolan, this Court held that the 90-day limit for ordering restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5), is not ironclad or jurisdictional. 560 U.S. at 608. As a result, a district court is permitted to take longer

in making its restitution award. The decision says nothing about the timeliness of a notice of appeal, or that the decades of precedent under Rule 4(b)(2) was altered in any way. The Court "le[ft] all such matters for another day." 560 U.S. at 618.

Prior to the Court's decision in Dolan, the Eleventh Circuit would not permit a criminal appeal to go forward until restitution was ordered. Under the Kapelshunik formulation, the Court of Appeals lacked jurisdiction over the appeal until a final judgment of restitution was entered, which should occur within 90 days under the statute. The flaw in that formulation was illuminated in Muzio.

The district court in Muzio had entered a judgment sentencing the defendant to imprisonment and stating restitution would be ordered in 90 days, with entry of a new judgment. Restitution was eventually ordered, but no new judgment was filed. Muzio only sought to appeal the sentence of incarceration, not restitution. The question presented was whether Muzio could proceed with his appeal of the sentence, or had to wait for a restitution judgment that might never come. Under Kapelushnik, the judgment was not deemed final so the appeal had to wait. But this could go on indefinitely.

This Court's decision in Dolan makes clear that the balance of the judgment imposing sentence was separately final for purposes of appeal, even if the restitution award has not yet occurred. 560 U.S. at 617-18. The holding in Dolan abrogated the portion of Kapelshunik that said otherwise. To conform, the Eleventh Circuit in Muzio receded from that portion of Kapelshunik, holding instead that a defendant could appeal his judgment and sentence in either of two ways: (1) in a single proceeding, or,

(2) in a separate appeal, based on a second notice of appeal. See 775 F.3d at 1250, 1254 n.13. In reaching this decision, both of Muzio's majority opinions refused to decide whether a second notice of appeal was required or the first one ripened, because it did not matter in that case: Muzio did not seek to challenge the restitution portion of his sentence, so it made no difference if the premature notice ripened to cover restitution or not. 757 F.3d at 1247 n.3 (Wilson, J.); id. at 1260 n.4 (Coogler, J., concurring).[4] Thus, Muzio did not affect the ripening portion of Kapelushnik's holding; that portion of the Eleventh Circuit's precedent should have remained intact.

The decision below overlooked that Muzio did not overrule that portion of Kapelushnik that recognizes Rule 4(b)(2) ripening. Indeed, neither Dolan nor Muzio holds that a separate appeal is necessary in all cases, or that Rule 4(b)(2) is inapplicable to appeals of restitution awards where the district judge announces at sentencing that restitution is mandatory.

Nevertheless, the Eleventh Circuit decision below holds that Mr. Manrique was required to file two notices of appeal in the same appeal, in order to contest both the

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[4] The three opinions in Muzio each state that the decision does not address Rule 4(b)(2) ripening. The dissent in Muzio criticized the majority for failing to address the question of whether the defendant's premature notice of appeal ripened into an operative notice of appeal when the second judgment (including restitution) was entered. 757 F.3d at 1268 (Tjoflat, J., dissenting). The majority opinions responded that ripening was irrelevant in that case because Muzio did not challenge the restitution award. 757 F.3d at 1247 n.3 (Wilson, J.) and at 1260 n.4 (Coogler, J., concurring) ("As explained in footnote three of the Majority opinion, we are not reviewing the November restitution order because Muzio did not make his restitution proceeding the subject of this appeal. As such, we need not consider the question the dissent focuses on . . . .").

original judgment in a criminal case, as well as the amended judgment, which merely added the specifics of restitution expressly reserved by the written terms of the original judgment. Although a separate notice of appeal would be required for the separate-appeal option of Muzio, it is not required in the single-proceeding option due to the ripening effect of Rule 4(b)(2).

Notably, the Eleventh Circuit determined it lacked jurisdiction due to what is, at worst, a prematurely untimely notice of appeal. Yet, the timeliness of a filed notice of appeal is not an event of jurisdictional significance in a criminal case. The Eleventh Circuit supported its erroneous jurisdictional conclusion with its 2005 decision, United States v. Cartwright, 413 F.3d 1295, 1299 (11th Cir. 2005), which held that, "[a]bsent the filing of a timely notice of appeal, a Court of Appeals is 'without jurisdiction to review the decision on the merits.'" See Manrique 618 F. App'x at 583. The jurisdictional premise of Cartwright is contrary, however, to this Court's subsequent decision in Bowles v. Russell, 551 U.S. 205 (2007), which abrogated Cartwright's conclusion that a timely notice of appeal is jurisdictional in criminal cases. See United States v. Lopez, 562 F.3d 1309, 1312-13 (11th Cir. 2009) ("Because the deadline in Rule 4(b) for a defendant to file a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional.") (recognizing that prior Circuit precedent to the contrary was abrogated by the Supreme Court's decision in Bowles v. Russell).

Consequently, the Eleventh Circuit's holding that "[w]e do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a

notice of appeal designating the amended judgment setting forth the restitution amount" misapprehends and overlooks the express language of Rule 4(b)(2), the portion of Kapelushnik's holding that remains intact despite Muzio, and the governing jurisdictional jurisprudence of Bowles and Lopez.

As this Court's decision in Lemke holds, the Court of Appeals has jurisdiction over a premature notice of appeal. The question is not one of jurisdiction, but rather whether substantial rights have been affected under Fed. R. Crim. P. 52(a). Here the government has made no such claim, nor could it, for the question of restitution was fully briefed by both parties in due course of the pending appeal.

D. Manrique incorrectly refused to decide the appeal of a restitution award in a deferred judgment case.

The sentencing proceeding below is notable because it illustrates how the notice of appeal captured restitution both in the first instance, and as amended to flesh out the dollar amount. The events below also demonstrate that the absence of a second notice of appeal in the same appellate case did not affect the government's substantial rights one whit.

In his oral pronouncement of sentence, the district judge specifically announced that restitution was mandatory. Those words included restitution in the sentence from the very first. The first written judgment then incorporated the oral pronouncement including restitution, but noted that the amount of restitution would be decided at a future date, followed by an amended judgment to reflect this. Both the oral pronouncement and the original written judgment ordered restitution (albeit sans a

dollar amount) and the written judgment spoke to the fact that a more specific amended judgment would be filed. When the defendant filed a timely notice of appeal as to the first judgment, it followed both the oral pronouncement that restitution is mandatory and the written judgment that the precise amount would be designated in an amended judgment. Thus, the original notice of appeal captured that portion of the sentence involving restitution and the language in that original judgment relating to a future amended judgment. See United States v. Cheal, 389 F.3d at 46-46, 53 (holding that where sentencing judge announced, "[y]ou shall pay restitution," but written judgment deferred restitution award, single notice of appeal from original judgment gave Court of Appeals jurisdiction to hear appeal of amended restitution judgment); United States v. Hyde (same); United States v. Stoian (same).

The notice of appeal captured the original judgment and it ripened under Rule 4(b)(2) to include the amended judgment mentioned in the original judgment, once the second judgment was entered. All parties and the clerk of the Court of Appeals understood that. All transcripts, orders and briefs were filed in the single appellate case, and both parties fully briefed the restitution issue, without objection or misunderstanding. Under the proper Rule 52(a) standard, a Court of Appeals should have proceeded to determine the merits of the restitution challenge on appeal. Yet, one circuit holds it lacks jurisdiction to do so (the Eleventh in Manrique); one (the Ninth in Castro) would have dismissed it if the government had simply objected based on timeliness, without addressing substantial rights; three circuits would have addressed the restitution issue (the First in Cheal, Second in Hyde, and Sixth in Stoian); but,

then again, the First Circuit in Cheal recognizes the uncertainty, so it recommends a second notice of appeal even though it is jurisdictionally unnecessary and it has no impact on substantial rights.

E. Manrique is an ideal vehicle to address the problematic interactions between deferred restitution judgments and appellate time limits, questions reserved by the Court's decision in Dolan.

In Dolan, this Court acknowledged the possibility of problematic interactions between deferred restitution orders and appellate time limits, but did not decide those questions because Dolan did not seek to appeal both the initial and amended judgments. Id., 560 U.S. at 618 (noting "the fact that the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present one (where there was no appeal from the initial conviction and sentence)," but "leav[ing] all such matters for another day.")

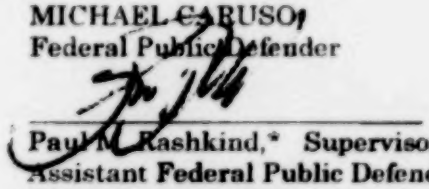
The Manrique decision exposes the questions Dolan perceived, but left unanswered, about the interaction of deferred restitution orders and appellate time limits. Moreover, this interaction illuminates a serious circuit split about how to accommodate it. As a result, Mr. Manrique's petition is an ideal vehicle for the Court to determine one of the issues it reserved in Dolan, the procedural requirements to perfect appeal of a deferred restitution judgment entered during a pending appeal of the judgment and sentence.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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December 2, 2015
Miami, Florida

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015) .... A

Order of the Court of Appeals for the Eleventh Circuit Denying Rehearing and Rehearing En Banc (Sept. 11, 2015), ... B

Judgment imposing sentence (June 24, 2014) C

Judgment imposing sentence (Sept. 18, 2014) ..... D

Information and Waiver of Indictment ..... E

Docket of Court of Appeals, Case No. 14-13029 ..... F

EXHIBIT A

618 Fed.Appx. 579
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Marcelo MANRIQUE, Defendant–Appellant.

No. 14–13029 | Non–Argument Calendar. | July 15, 2015.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Southern District of Florida to possession of material involving a minor engaging in sexually explicit conduct.

Holdings: Defendant appealed. the Court of Appeals held that:

[1] district court sufficiently explained its reasons for imposing life term of supervised release;

[2] life term of supervised release was substantively reasonable; and

[3] Court of Appeals lacked jurisdiction to entertain defendant's challenge to his restitution amount.

Affirmed.

West Headnotes (3)

[1] **Sentencing and Punishment**
↩ Sufficiency

District court's explanation for imposing life term of supervised release on defendant who pled guilty to possession of material involving a minor engaging in sexually explicit conduct, that it did not think defendant was a danger to recidivate and the sentence was sufficient but not excessive to perform a deterrent function, was sufficient to demonstrate the court considered the parties' arguments and had a reasoned basis for exercising its authority, in light of fact the court imposed a Guidelines term of supervised release. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[2] **Sentencing and Punishment**
↩ Obscenity and lewdness

Sentencing and Punishment
↩ Effect of statute or guideline

Defendant's life term of supervised release for possession of material involving a minor engaging in sexually explicit conduct was substantively reasonable; district court weighed the statutory sentencing factors when deciding on a sentence, it specifically discussed the need for deterrence balanced with its belief defendant was not a recidivism risk, sentence imposed was within the Guidelines range, and sentence was in accord with Guidelines' recommendation that supervised release term be the statutory maximum. 18 U.S.C.A. §§ 2252, 3553(a); U.S.S.G. § 5D1.2(b)(2), 18 U.S.C.A.

Cases that cite this headnote

[3] **Criminal Law**
↩ Form and requisites

Defendant, who pled guilty to possession of material involving a minor engaging in sexually explicit conduct, did not file a notice of appeal designating district court's amended judgment setting forth the restitution amount, as required for Court of Appeals to have jurisdiction to entertain defendant's challenge to his restitution amount; defendant appealed only the original judgment, which deferred determination of the restitution amount.

Cases that cite this headnote

Attorneys and Law Firms

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Raymond D'Arsey Houlihan, III, Michael Caruso, Federal Public Defender, Vanessa Louise Chen, Federal Public Defender's Office, Miami, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:14–cr–20064–JEM–1.

Before TJOFLAT, WILSON and BLACK, Circuit Judges.

Opinion

PER CURIAM:

Marcelo Manrique appeals his life term of supervised release and the restitution award ordered after he pled guilty to one count of possession of material involving a minor engaging in sexually explicit conduct, *581 in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). On appeal, he argues: (1) the district court erred procedurally in imposing a life term of supervised release because it failed to adequately explain the sentence and consider the required 18 U.S.C. § 3553(a) factors; (2) the life term of supervised release was substantively unreasonable; and (3) the district court imposed an erroneous restitution amount. We will address each of these contentions in turn. After review, we affirm.

I. DISCUSSION

As the parties are familiar with the facts of this case, we will not recount them in detail. We include only those facts necessary to the discussion of each issue.

A. Procedural Reasonableness

The reasonableness of a sentence is generally reviewed through a two-step process. *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir.2008). The first step is to "ensure that the district court committed no significant procedural error such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

[1] Manrique did not clearly articulate an objection to his sentence on procedural grounds, and therefore we review his procedural reasonableness claim for plain error. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir.2014) (stating when a party does not clearly articulate an objection on procedural grounds at the time of sentencing, plain error review is appropriate). The record shows the district court stated it had considered the § 3553(a) factors before announcing its total sentence, and added it thought the sentence was fair in light of all of the § 3553(a) factors. Additionally, the court stated it had considered the parties' arguments-such as Manrique's argument in favor of a 15–year term of supervised release. Moreover, Manrique does not argue the court improperly calculated or failed to calculate the Guidelines range, and the record reflects the court referred to the Guidelines as advisory, indicating it did not treat them as mandatory. Manrique also does not point to any clearly erroneous facts upon which the district court based his term of supervised release, nor does the record reveal any. As to Manrique's argument the district court did not adequately explain the sentence, the court explained it did not think Manrique was a danger to recidivate and the sentence was sufficient but not excessive to perform a deterrent function. Considering the court imposed a Guidelines term of supervised release, the explanation was sufficient to demonstrate the court considered the parties' arguments and had a reasoned basis for exercising its authority. *See Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."). For the foregoing reasons, Manrique cannot show plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005) (stating under plain error review, there must be (1) an error, (2) that is plain, (3) that affect the defendant's substantial rights, and (4) seriously affects the fairness or integrity of the judicial proceedings).

*582 *B. Substantive Reasonableness*

The second step when determining the reasonableness of a sentence is review for substantive reasonableness. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). Substantive reasonableness review seeks to "evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a)." *Id.* The court must impose a sentence "sufficient, but not greater than necessary to comply with the purposes" listed in § 3553(a)(2), including the need to reflect the seriousness of the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. *See*

18 U.S.C. § 3553(a)(2). In imposing a particular sentence, the court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable Guidelines range, pertinent policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)-(7).

The Sentencing Guidelines state the term of supervised release may be up to life if the offense at issue is a sex offense, and recommend the statutory maximum term of supervised release if the offense of conviction is a sex offense. U.S.S.G. § 5D1.2(b)(2). The statutorily authorized term of supervised release for a § 2252 offense is five years to life. 18 U.S.C. § 3583(k).

[2] The record shows the district court weighed the § 3553(a) factors when deciding on a sentence, and it was not necessary for it to lay them out one by one. *See United States v. Robles*, 408 F.3d 1324, 1328 (11th Cir.2005) (stating district courts do not have to conduct an accounting of every § 3553(a) factor and explain the role each played in the sentencing decision). Still, it specifically discussed the need for deterrence balanced with its belief Manrique was not a recidivism risk. Even if the court favored some factors over others, it was within its discretion to do so. *See United States v. Brown*, 772 F.3d 1262, 1267 (11th Cir.2014) (stating it is within the court's discretion to afford one factor greater weight). Furthermore, the sentence imposed by the district court was within the Guidelines range, and was in accord with the Guidelines' recommendation that the supervised release term be the statutory maximum, which indicates reasonableness. *See Talley*, 431 F.3d at 788 ("[W]hen the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one."). Based on the foregoing, the district court's decision to impose a life term of supervised release does not leave a "definite and firm conviction" that it committed a clear error in judgment. *See United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir.2010) (en banc) (stating we will vacate a sentence imposed by a district court only when left with a "definite and firm conviction that the district court committed a clear error of judgment").

C. Restitution

We must resolve jurisdictional issues before addressing the merits of underlying claims, and have an obligation to review *sua sponte* whether we have jurisdiction. *United States v. Cartwright*, 413 F.3d 1295, 1299 (11th Cir.2005). Absent the filing of a timely notice of appeal, we are without jurisdiction to review the decision on the merits. *Id.* We review questions regarding our subject matter jurisdiction *de novo*. *Id.*

We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until ***583** the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. *See United States v. Kapelushnik*, 306 F.3d 1090, 1093–94 (11th Cir.2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90–day deadline ... does not deprive the court of the power to order restitution." *Dolan v. United States*, 560 U.S. 605, 611, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010). We subsequently recognized, in light of *Dolan*, the *Kapelushnik* framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. *United States v. Muzio*, 757 F.3d 1243, 1246 (11th Cir.), *cert. denied* — U.S. ——, 135 S.Ct. 395, 190 L.Ed.2d 279 (2014).

In *Muzio*, the district court entered a judgment sentencing the defendant to 163 months' imprisonment and stating restitution would be ordered but the determination of the amount would be deferred for 90 days, with an amended judgment entered after such determination. *Id.* at 1245. The defendant appealed that judgment, and an amended judgment reflecting the amount of restitution was never entered. *Id.* at 1245–46. However, we determined judgment was nonetheless final for purposes of appeal because it sentenced the defendant to a term of imprisonment. *Id.* at 1247. We concluded "a judgment imposing a prison sentence and restitution but leaving the specific amount of restitution unsettled is immediately appealable." *Id.* at 1250. We acknowledged the rule could "lead to bifurcation of some defendants' cases," but stated "[i]f a subsequent judgment is entered ordering restitution, the defendant may separately appeal that order, and the appeal may be heard separately or consolidated with the initial appeal if that has not yet been resolved," or a defendant could avoid bifurcation by waiting to appeal until restitution was resolved. *Id.* As such, we held when courts enter sentencing judgments ordering restitution but deferring determination of the amount, defendants have the option to either (a) timely appeal from the initial judgment and then, if desired, timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only, in which case all issues will be heard in a single appeal. *Id.* at 1250 n. 9.

[3] We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount. *See Cartwright*, 413 F.3d at 1299. In his reply brief, Manrique argues *Muzio* is inapplicable because the amended judgment was never filed in that case, but *Muzio* 's discussion of a bifurcated appeals process shows its ruling also applies in situations such as this where an amended judgment was later filed. *See Muzio*, 757 F.3d at 1250. Manrique also argues his premature notice of appeal ripened following the entry of the amended judgment, but that argument relies on the *Kapelushnik* framework, which *Muzio* 's framework replaced. *See id.* at 1246. Under *Muzio*, Manrique was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only. *Id.* at 1250 n. 9. Instead, he appealed only the original judgment. Therefore, Manrique's challenge to the restitution order is dismissed for lack of jurisdiction. *See Cartwright*, 413 F.3d at 1299.

II. DISCUSSION

Accordingly, we affirm Manrique's sentence as set forth in the district court's ***584** original judgment, and dismiss his challenge to the restitution amount reflected in his amended judgment for lack of jurisdiction.

AFFIRMED IN PART, DISMISSED IN PART.

All Citations

618 Fed.Appx. 579

End of Document

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-13029-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARCELO MANRIQUE,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

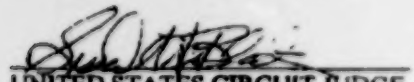
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, WILSON and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

EXHIBIT C

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

MARCELO MANRIQUE

JUDGMENT IN A CRIMINAL CASE

Case Number: **14-20064-CR-MARTINEZ**
USM Number: **02081-104**

Counsel For Defendant: **Raymond D'Arsey Houlihan**
Counsel For The United States: **Brooke Watson**
Court Reporter: **Dawn Whitmarsh**

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **6/23/2014**

Jose E. Martinez
United States District Judge

Date: 24 June 2014

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The defendant shall surrender to the US Marshal for this District on or before June 23, 2014 at 3:15 p.m.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of life as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors - The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victims.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victims.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration - The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

EXHIBIT D

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

MARCELO MANRIQUE

JUDGMENT IN A CRIMINAL CASE

Case Number: **14-20064-CR-MARTINEZ**
USM Number: **02081-104**

Counsel For Defendant: **Raymond D'Arsey Houlihan**
Counsel For The United States: **Brooke Watson**
Court Reporter: **Dawn Whitmarsh**

Date of Original Judgment: 6/23/2014
(or Date of Last Amended Judgment)

AMENDMENT REASON(S):
Modification of Restitution Order (18 U.S.C. §3664)

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **9/17/2014**

Jose E. Martinez
United States District Judge

Date: 9/18/14

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **life** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors - The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victim.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victim.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration - The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	**$4,500.00**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
Marc C. Lenahan	$0.00	$4,500.00	

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$4,500.00.** During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to the address below.

The restitution will be forwarded by the Clerk of the Court to the victims on the attached list.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

EXHIBIT E

Jan 31, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20064-CR-MARTINEZ/GARBER

18 U.S.C. § 2252(a)(4)(B) & (b)(2)
18 U.S.C. § 2253

UNITED STATES OF AMERICA

vs.

MARCELO MANRIQUE,

Defendant.
_____/

INFORMATION

The United States Attorney charges that:

On or about January 10, 2014, in Miami-Dade County, in the Southern District of Florida, the defendant,

MARCELO MANRIQUE,

did knowingly possess matter, that is, a generic desktop computer, which contained any visual depiction that had been shipped and transported using any means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce, and which was produced using materials which have been so shipped and transported, by any means, including by computer, and the production of such visual depiction having involved the use of a minor engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2), and such visual depiction was of such conduct, in violation of Title 18, United States Code, Section 2252(a)(4)(B) and (b)(2).

Pursuant to Title 18, United States Code, Section 2252(b)(2), it is further alleged that such visual depiction involved a prepubescent minor or a minor who had not attained twelve years of age.

CRIMINAL FORFEITURE

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **MARCELO MANRIQUE**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 2252, as alleged in this Indictment, the following property will be forfeited to the United States pursuant to Title 18, United States Code, Section 2253:

(a) any visual depiction of a minor engaged in sexually explicit conduct, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of Chapter 110, Title 18, United States Code;

(b) any property, real or personal, constituting or traceable to gross profits or other proceeds which the defendant obtained from such violation; and

(c) any property, real or personal, used or intended to be used to commit or to promote the commission of such violation and any property traceable to such property.

3. The property which is subject to forfeiture includes, but is not limited to, the following:

(a) A generic desktop computer;

(b) A Seagate Barracuda 7200.7 160 Gbytes hard drive;

(c) A Seagate "Barracuda" 3000 GB hard drive;

(d) A Western Digital 1.0TB hard drive;

(e) A Maxxtor hard drive;

(f) A Western Digital WD200 20.0 GB hard drive; and

(g) A FUJITSU hard drive model M2684TAU.

All pursuant to Title 18, United States Code, Section 2253, and the procedures set forth at Title 21, United States Code, Section 853, as made applicable by Title 18, United States Code, Section 2253(b).

WIFREDO A. FERRER
UNITED STATES ATTORNEY

BROOKE C. WATSON
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

MARCELO MANRIQUE,

Defendant.
_____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

__X__ Miami ___ Key West
___ FTL ___ WPB ___ FTP

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) NO
List language and/or dialect _____

4. This case will take 0 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 day		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) NO
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 14-mj-02030-PAW
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of _____
Rule 20 from the District of _____

Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes X No

BROOKE C. WATSON
ASSISTANT UNITED STATES ATTORNEY
Court ID No. A5501855

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **MARCELO MANRIQUE**

Case No: _____

Count #: 1

Possession of Child Pornography

Title 18, United States Code, Section 2252(a)(4)(B) & (b)(2)

***Max. Penalty: 20 years' imprisonment**

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

EXHIBIT F

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 14-13029
USA v. Marcelo Manrique
Appeal From: Southern District of Florida
Fee Status: IFP Granted

Docketed: 07/08/2014
Termed: 07/15/2015
Case Handler: Lewis, Carol R., BB
(404) 335-6179

Case Type Information:
1) Criminal
2) Direct Criminal
3)

Originating Court Information:
District: 113C-1 : 1:14-cr-20064-JEM-1
Court Reporter: Dawn Whitmarsh
Sentencing Judge: Jose E. Martinez, U.S. District Judge
Date Filed: 01/31/2014
Date NOA Filed:
07/08/2014

Prior Cases:
None

Current Cases:
None

UNITED STATES OF AMERICA

Plaintiff - Appellee

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versus

MARCELO MANRIQUE Defendant - Appellant	Raymond D'Arsey Houlihan, III Direct: 305-530-7000 [COR LD NTC Fed Public Defender] Federal Public Defender's Office Firm: 305-530-7000 150 W FLAGLER ST STE 1700 MIAMI, FL 33130-1555 Paul Michael Rashkind Direct: 305-536-6900, ext. 4241 [COR LD NTC Fed Public Defender] Federal Public Defender's Office Firm: 305-530-7000 150 W FLAGLER ST STE 1700 MIAMI, FL 33130-1555 Michael Caruso, Federal Public Defender Direct: 305-536-6900 [COR NTC Fed Public Defender] Federal Public Defender's Office Firm: 305-530-7000 150 W FLAGLER ST STE 1700 MIAMI, FL 33130-1555 Vanessa Louise Chan Direct: 305-530-7000 [COR NTC Fed Public Defender] Federal Public Defender's Office Firm: 305-530-7000 150 W FLAGLER ST STE 1700 MIAMI, FL 33130-1555

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus MARCELO MANRIQUE, Defendant - Appellant.

07/08/2014	10 pg, 474.49 KB	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Marcelo Manrique on 07/08/2014. Fee Status: IFP Granted.
07/10/2014	1 pg, 347.33 KB	APPEARANCE of Counsel Form filed by Kathleen Salyer for USA (ECF: Kathleen Salyer)
07/10/2014	1 pg, 347.33 KB	APPEARANCE of Counsel Form filed by Kathleen Salyer for USA (ECF: Kathleen Salyer)
07/10/2014		E-filed Appearance of Counsel processed for Attorney Kathleen Mary Salyer for Appellee USA in 14-13029.
07/16/2014	1 pg, 145.93 KB	APPEARANCE of Counsel Form filed by Raymond D'Arsey Houlihan, III for Marcelo Manrique. (ECF: Raymond Houlihan)
07/16/2014	1 pg, 145.16 KB	APPEARANCE of Counsel Form filed by Michael Caruso for Marcelo Manrique. (ECF: Raymond Houlihan)
07/16/2014	3 pg, 14.55 KB	Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Raymond Houlihan)
07/18/2014	1 pg, 73 KB	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered. (ECF: Raymond Houlihan)
07/22/2014	1 pg, 66.83 KB	TRANSCRIPT INFORMATION FORM PROCESSED. Transcript Order: Filer: Marcelo Manrique, Court Reporter: Dawn Whitmarsh, Proceeding Type and Date: Plea Hearing 04/03/2014, Sentencing 06/24/2014.
08/20/2014	1 pg, 66.58 KB	Court Reporter Acknowledgment filed. Transcript Order: Dawn Whitmarsh, 07/22/2014, Marcelo Manrique, Sentencing 06/24/2014, Plea Hearing 04/03/2014.
08/20/2014		TRANSCRIPTS FILED. Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique. Dt. all Trans. Filed: 08/12/2014, Proceeding Type and Date: Sentencing 06/24/2014, Plea Hearing 04/03/2014.
09/03/2014	3 pg, 27.37 KB	Certificate of Interested Persons and Corporate Disclosure Statement filed by Kathleen M Salyer for USA Attorney Kathleen Mary Salyer for Appellee USA. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Kathleen Salyer)
09/19/2014	1 pg, 72.81 KB	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered. (ECF: Raymond Houlihan)
09/19/2014	1 pg, 66.57 KB	TRANSCRIPT INFORMATION FORM PROCESSED. Transcript Order: Filer: Marcelo Manrique, Court Reporter: Dawn Whitmarsh, Proceeding Type and Date: Other Hearings 09/17/2014.
09/23/2014	6 pg, 456.57 KB	USDC Restitution Order as to Appellant Marcelo Manrique was filed on 09/18/2014. Docket Entry 67.
10/16/2014	1 pg, 14.01 KB	Court Reporter acknowledgment not filed. Letter issued to Court Reporter Dawn Whitmarsh as to Appellant Marcelo Manrique. Transcript is due to be filed in District Court 30 days from 09/19/2014.
10/29/2014	1 pg, 14.28 KB	Transcripts were due to be filed on 10/20/2014 by Court Reporter Dawn Whitmarsh and are overdue. A 10% discount is required after 11/19/2014. A 20% discount is required after 12/19/2014.
11/14/2014		TRANSCRIPTS FILED. Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique. Dt. all Trans. Filed: 11/04/2014, Proceeding Type and Date: Other Hearings 09/17/2014.
11/14/2014	2 pg, 16.85 KB	Briefing Notice issued to Appellant Marcelo Manrique. The appellants brief is due on or before 12/15/2014. The appendix is due no later than 7 days from the filing of the appellant's brief.
12/12/2014		Over the phone extension granted by clerk. Appellants brief due on 12/15/2014; extension granted to 12/22/2014 as to Appellant Marcelo Manrique. Appendix due on 12/29/2014 as to Appellant Marcelo Manrique.
12/22/2014	40 pg, 110.55 KB	Appellant's brief filed by Marcelo Manrique. (ECF: Raymond Houlihan)
12/22/2014	66 pg, 1.1 MB	Appendix filed [1 VOLUMES] by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
12/23/2014		Received paper copies of EBrief filed by Appellant Marcelo Manrique.

12/23/2014	☐	Received paper copies of EAppendix filed by Appellant Marcelo Manrique. [1 VOLUME - 2 SETS]
12/23/2014	☐	Appellant's SEALED PSI for the Electronic ROA Program filed by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique.
12/30/2014	☐ 1 pg, 746.9 KB	APPEARANCE of Counsel Form filed by Phillip DiRosa for USA (ECF: Phillip DiRosa)
12/30/2014	☐	Added Attorney(s) Phillip Drew DiRosa for party(s) Appellee USA, in case 14-13029.
01/14/2015	☐ 45 pg, 133.98 KB	Appellee's Brief filed by Appellee USA. (ECF: Phillip DiRosa)
01/14/2015	☐ 3 pg, 24.74 KB	AMENDED Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Phillip Drew DiRosa for Appellee USA. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Phillip DiRosa)
01/14/2015	☐ 1 pg, 508.34 KB	APPEARANCE of Counsel Form filed by Emily M. Smachetti for USA (ECF: Emily Smachetti)
01/14/2015	☐	Added Attorney(s) Emily M. Smachetti for party(s) Appellee USA, in case 14-13029.
01/14/2015	☐ 22 pg, 493.91 KB	Supplemental Appendix [VOLUME 1] filed by Appellee USA.--[Edited 01/30/2015 by MLS] (ECF: Phillip DiRosa)
01/15/2015	☐	Received paper copies of EBrief filed by Appellee USA.
01/15/2015	☐	Received paper copies of EAppendix filed by Appellee USA. [1 VOLUME - 2 SETS]
01/15/2015	☐	SEALED Supplemental Appendix [VOLUME 2 - 2 sets] filed by Attorney Phillip Drew DiRosa for Appellee USA. Service date: 01/14/2015 3rd party - Attorney for Appellant: Houlihan.
01/27/2015	☐	Over the phone extension granted by clerk. Reply brief due on 02/09/2015.
02/09/2015	☐ 32 pg, 99.54 KB	Reply Brief filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
02/10/2015	☐	Received paper copies of EBrief filed by Appellant Marcelo Manrique.
07/15/2015	☐ 1 pg, 8.57 KB	Judgment entered as to Appellant Marcelo Manrique.
07/15/2015	☐ 10 pg, 44.38 KB	Opinion issued by court as to Appellant Marcelo Manrique. Decision: Affirmed in part and Dismissed in part. Opinion type: Non-Published. Opinion method: Per Curiam.
08/04/2015	☐ 1 pg, 145.95 KB	APPEARANCE of Counsel Form filed by Rashkind, Paul M, Appellant (ECF: Paul Rashkind)
08/04/2015	☐ 33 pg, 98.12 KB	Petition for rehearing en banc (with panel rehearing) filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
08/04/2015	☐	Added Attorney(s) Paul Michael Rashkind for party(s) Appellant Marcelo Manrique, in case 14-13029.
08/04/2015	☐	E-filed Appearance of Counsel processed for Attorney Paul Michael Rashkind for Appellant Marcelo Manrique in 14-13029.
09/11/2015	☐ 2 pg, 40.96 KB	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Marcelo Manrique are DENIED. [7571685-1]
09/21/2015	☐ 2 pg, 451.83 KB	Mandate issued as to Appellant Marcelo Manrique.

Clear All

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